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## UNFAIR DISMISSAL: PROCEDURE, FAIRNESS AND COMPENSATION

### ALEXANDER and HATHERLEY v BRIDGEN ENTERPRISES LTD. [2006] IRLR 422

This article addresses those provisions of Employment Act (EA) 2002 (implemented on 1 October 2004) which introduce statutory disciplinary and grievance procedures. In particular, it will consider the impact of the new provisions on traditional approaches to procedural unfairness by employers, the doctrine established by the House of Lords in *Polkey v A E Dayton Services*<sup>1</sup> and the calculation of compensation in these cases.

A significant recent decision of the Employment Appeal Tribunal, handed down by Elias P.<sup>2</sup> has answered a number of questions about the meaning of statutory language which is described as 'elusively vague' by the President of the EAT.<sup>3</sup> Inevitably, further questions remain.

#### Procedural Unfairness

Throughout the 1970s and 1980s there was a debate as to the consequences of procedural failings by an employer when dismissing an employee, particularly where it seemed probable that the employee would have been dismissed even if all procedures had been properly carried out. Earlier decisions<sup>4</sup> suggesting that this would render a procedurally unfair dismissal fair were rejected in *Polkey* where the House of Lords established what has come to be known as the *Polkey* doctrine. The likelihood of dismissal anyway if procedures had been properly carried out is irrelevant to the test of reasonableness (Employment Rights Act (ERA) 1996 s. 98(4)) unless, in exceptional circumstances, the normal procedural steps would have been futile. Instead, the likelihood of the procedural failure making no difference should be assessed and the compensatory award reduced by the appropriate proportion. This was widely accepted as a more just approach to the problem, avoiding the 'all or nothing' effect of the earlier approach. Where the dismissal was certain to have taken place anyway, 100% reduction could be ordered.

Employment Act 2002 has, in part, reversed this ruling. It seeks to achieve two policy objectives:

- to improve the quality and use of disciplinary and grievance procedures in employment;
- to reduce the number of cases coming before the employment tribunals by encouraging the parties to explore other avenues before turning to litigation.

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<sup>1</sup> [1988] AC 344.

<sup>2</sup> *Alexander and Hatherley v Bridgen Enterprises Ltd.* (2006) UKEAT/0107/06/DA

<sup>3</sup> *Ibid.*, at para 49

<sup>4</sup> *British Labour Pump v Byrne* [1979] IRLR 94.

To this end it introduces new statutory disciplinary procedures.<sup>5, 6</sup> If an employer dismisses an employee without going through these required procedures the dismissal is automatically unfair.<sup>7</sup> This is provided by ERA 1996 s. 98A (1).

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
  - (a) one of the procedures set out in Part 1 of Schedule 2 to the Employment Act 2002 (dismissal and disciplinary procedures) applies in relation to the dismissal,
  - (b) the procedure has not been completed, and
  - (c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

The employer will have no defence based on the s. 98(4) reasonableness test. What is more, the compensation awarded in these cases will normally be increased by between 10 and 50%, at the discretion of the tribunal<sup>8</sup> and a minimum basic award of four weeks' pay will be awarded<sup>9</sup>. However, where the employer can show that the employee would have been dismissed anyway, the *Polkey* doctrine will apply, thus simplifying the task of the tribunal in establishing liability while mitigating the financial consequences for employers.<sup>10</sup>

It is worth noting at this point that the statutory procedural requirements are not very demanding. They are to be found in Part 1, Chapter 1 of Schedule 2 to EA 2002 and require three steps.

Step 1 is a written statement of the grounds for deciding to dismiss, with an invitation to a meeting.

Step 2 requires the employer, before the meeting, to inform the employee of the basis for those grounds, so that the employee may consider his response. This need not be in writing.

Step 3, if the employee wishes to appeal, requires the employer to provide an appeal meeting.

The dismissal must not be implemented until the first two stages have been completed.

Where the employer meets the requirements of the statutory disciplinary procedures, but is responsible for some other procedural failing which arguably affects the fairness of the dismissal the reasonableness of that action or omission will be assessed in the conventional way under s. 98(4)

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<sup>5</sup> See Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752) for further provisions as to the operation of these requirements.

<sup>6</sup> There are analogous requirements for employees to use statutory grievance procedures before bringing a claim, but these are beyond the scope of this article.

<sup>7</sup> ERA 1996 s. 98A (introduced by EA 2002 s. 34 through the Employment Act 2002 (Commencement No. 6 and Transitional Provisions Order) Regulations, SI 2004/1717) Art 2/2.

<sup>8</sup> EA 2002 s. 31(3).

<sup>9</sup> ERA 1996 s. 120 (1A) (introduced by EA 2002).

<sup>10</sup> See the judgment of Elias P. in *Alexander* (op. cit. n. 2) at para 58.

ERA 1996. However, s. 98A(2) reverses, in part, the *Polkey* doctrine. It provides:

Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of s. 98(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

It is important to note that 'procedure' here means any procedure the employer may have, not the procedure laid down in s. 98A (1) above. According to Elias P., this will not apply to all cases where the statutory disciplinary procedures have been complied with.

...even where the statutory procedures are complied with but the dismissal is unfair under s. 98(4), *Polkey* will still apply where on the balance of probabilities the employee would *not* have been dismissed even had a fair procedure been complied with, but where there is a chance that he might have been.<sup>11</sup>

Thus the *Polkey* doctrine will still apply where the statutory procedures have not been complied with and where, in spite of compliance, there remains unfairness combined with a possibility (but not a probability) that the employee would have been dismissed anyway.

### **The facts of *Alexander***

*Alexander* was a case, like *Polkey* itself, of redundancy dismissal. The business was in difficulties, a number of employees had to be laid off and the employer introduced a matrix of six criteria. Employees affected were warned at a meeting of the risk of redundancy, told of the criteria, but given no detail as to the guidelines being applied to each criterion. Nine days later, at a second meeting, those selected were told, without an opportunity to comment on the assessment of their own particular performance. At this time they were given their own, but not others' scores. They appealed and, just before the appeal meeting, their union representative was given the selection criteria, the guidelines and the (anonymised) marks of all.

### **What is required by the statutory disciplinary procedure?**

The EAT applied the policy of the legislation to provide guidance as to what is required by the steps of the statutory procedure. They recognised:

- the need for employees to have sufficient information to be able to give a considered and informed response to the proposed decision to dismiss;

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<sup>11</sup> *Ibid.* para 58.

- that only minimal standards were intended by Parliament, as the consequences of failure are automatic unfair dismissal and enhanced compensation, but that;
- the defence available to employers who complied with the statutory procedures, but who otherwise failed to follow fair procedures and could show that dismissal would have occurred anyway suggested that the minimum requirement should not be set too low.<sup>12</sup>

On that basis they concluded the following:

- at step 1 ‘the employee merely needs to be told that he is at risk of dismissal and why’;<sup>13</sup>
- at step 2 ‘the employee must be given sufficient detail of the case against him to enable him properly to put his side of the story’.<sup>14</sup>

This formulation works well for misconduct cases, but redundancy dismissals are more complex. The employer must not only establish the view that redundancies are required but also which employees are to be selected. Where, as in *Alexander*, a matrix of criteria is applied, each employee should be told the selection criteria and his or her own assessment.<sup>15</sup> That, however, is as far as it goes. An employee may not also insist on knowing the ‘break point’ (the score below which employees are selected for redundancy). Note that failure to provide this information may well render the dismissal unfair under s. 98(4), but not automatically unfair under s. 98A.

### **The extent of the defence in s. 98A(2)**

We have already seen that s. 98A(2) may provide a defence to employers complying with these minimum criteria but nevertheless failing to carry out a fair procedure. Conflicting EAT decisions over the scope of this defence have been handed down in recent months. In a misconduct case, *Pudney v Network Rail*<sup>16</sup> HH Judge McMullen QC suggested, *obiter*, that this only applied to minor or technical procedural failings.<sup>17</sup> Where the defect could be seen as ‘substantive’ (for example, a wholesale failure to consult), the s. 98A(2) defence should not apply. This view is rejected (equally *obiter*) by the EAT in *Alexander*, preferring a wide view of ‘procedural’ defects. Although neither decision is binding, the relative authority of the decision of the President suggests that this view is likely to prevail.<sup>18</sup>

### **The impact on compensation**

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<sup>12</sup> *Ibid.* para 34-36.

<sup>13</sup> *Ibid.* para 38.

<sup>14</sup> *Ibid.* para 39.

<sup>15</sup> *Ibid.* para 45.

<sup>16</sup> [2006] UKEAT/07/07/05.

<sup>17</sup> See *Pudney*, paras 38 – 40.

<sup>18</sup> It is worth noting that the editor of the Industrial Relations Law Reports prefers the *Pudney* analysis (Rubinstein, *Highlights*, [2006] IRLR 413).

An employer's failure to comply with the statutory disciplinary and dismissal procedures has two consequences for assessing the compensation to be awarded to the automatically unfairly dismissed employee.

*Basic Award:* S. 120(1A) ERA 1996 provides that the Basic Award will be no less than four weeks' pay unless (s. 120(1B)) that would result in injustice to the employer. This is therefore only of significance to employees with very short periods of employment. Any earlier payment of redundancy pay would need to be set off against the four week minimum payment in the normal way.

*Compensatory Award:* s. 31(3) EA 2002 provides that where the employer is at fault in not completing the statutory procedure before proceedings are begun the Tribunal should increase the Compensatory Award<sup>19</sup> by between 10 and 50%. This should not be done where 'exceptional circumstances' make it inequitable so to do.

This raises a complication in the assessment of the Compensatory Award in s. 98A cases. Once the actual loss caused to the unfairly dismissed employee has been calculated, the appropriate uplift should be made. If, however, a *Polkey* situation exists there should also be a reduction to reflect the likelihood of the employee having been dismissed anyway. Given that these are both percentage calculations they can be made in any order without affecting the outcome.

*An example:* An employee is dismissed after a flawed statutory dismissal procedure, the tribunal decides to impose a 20% s. 31(3) uplift but also concludes that there is a 50% chance that the employee would have been dismissed anyway. The calculation of actual loss amounts to £10,000. The tribunal will enhance that figure by 20% (producing a sub-total of £12,000) then apply the 50% *Polkey* deduction, producing a final total of £6,000.

It should be noted, however, that where the Tribunal finds that there was a certainty that the employee would have been dismissed anyway, the *Polkey* deduction would be 100%, producing a zero Compensatory Award whatever the s. 31(3) uplift. This is what in fact happened in *Alexander*.

A final point is that there may be circumstances where it is clear that an employee would have been dismissed despite failures in the statutory dismissal procedures, but that pursuing those procedures would have delayed the date of dismissal. In such circumstances the compensatory award should be restricted to lost income during that period of delay.<sup>20</sup>

### **What must the employer establish?**

The remaining issue concerns the interpretation of s. 98A(2). This is the provision which disappplies the *Polkey* principle if the employer 'shows that *he*

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<sup>19</sup> The restriction of this provision to the Compensatory Award may be found in s. 124A ERA 1996.

<sup>20</sup> See *Gover v Propertycare Ltd* [2006] EWCA Civ 286.

*would have decided to dismiss the employee if he had followed the procedure'* (emphasis added). Some matters are clear. The burden is on the employer to establish this and must do so on an evidential basis, not on mere assertion. As in civil matters generally, the standard of proof is a balance of probabilities. What, however, must the employer show? According to the EAT in *Alexander* it is that there is a 51% or better chance of the employee being dismissed anyway.<sup>21</sup> I suggest, with respect, that this is not a necessary interpretation of s. 98A(2), conflating the standard of proof with the nature of what must be proven. Other dicta of Elias P in *Alexander* draw attention to another, arguably more appropriate interpretation.

The italicised words above indicate the statutory requirement. Elias P explains the meaning of this as follows:

So once the statutory requirements have been met, the failure to comply with additional procedural safeguards will not render the dismissal unfair *if the employer shows that the employee has not in fact been prejudiced as a consequence.*<sup>22</sup>

This, surely is what the policy of the legislation requires. The application of the *Polkey* principle is to be limited, but there is no suggestion that a dismissal should become fair if there is no more than a better-than-average chance of dismissal anyway. S. 98A(2) does not require an employer to show that he would probably have dismissed the employee, or even that it is more likely than not that he would have done so (as the 51% formulation would suggest). It requires him to show that he would have decided to dismiss the employee.

It is, of course, inherently difficult to show what might have happened. The court cannot establish certainties. Thus, to speak of distinguishing between 50% and 51% probabilities is hard to justify. The nature of the task was expressed well by Lord Prosser:

It seems to us the matter will be one of impression and judgment so that a Tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say with more or less confidence that a failure made no difference or whether the failure was such that one cannot sensibly construct the world as it might have been.<sup>23</sup>

In *Alexander* itself the Tribunal had sufficient evidence before it to conclude that they could construct the world as it might have been and accept that there was 100% likelihood that the employees would have been dismissed anyway. The EAT expressed the view that such a finding will be relatively rare.<sup>24</sup> This is undoubtedly correct. One of the classic examples of a procedural failing which would not breach the statutory requirements but would generally lead to a dismissal being unfair under s. 98(4) is a lack of consultation in a redundancy situation. The problem for the Tribunal is that it

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<sup>21</sup> *Op. cit.* n. 2 at para 58.

<sup>22</sup> *Ibid.* para 16.

<sup>23</sup> In *King v Eaton (No 2)* [1998] IRLR 686.

<sup>24</sup> *Op. cit.* n. 2 at para 71.

is impossible to know what effective consultation might have achieved. In some circumstances a workforce might propose alternative ways of reducing costs so as to avoid a redundancy situation. In others, proposals for selection criteria which had not occurred to management might arise. In either case the outcome could be changed. This is why procedural failings can be so significant in unfair dismissal cases. It also explains why it would be inappropriate for the employer merely to have to show (on a balance of probabilities) that he would have been more likely than not to dismiss the employee after going through the procedures properly.

This begs the difficult question of what the employer must show. The test cannot be that the employer must establish that it is 100% certain that he would have dismissed anyway, as this would in effect perpetuate the *Polkey* doctrine which the legislation was designed to replace in these cases. 51% is equally unsatisfactory for the reasons presented above. This is an issue ripe for further guidance from the appellate courts.